FILE COPY

No. 47

In the Supreme Court of the United States

OCTOBER TERM, 1959

LAWRENCE CALLANAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 752

LAWRENCE CALLANAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. 13-21) has not yet been reported. The opinion of the district court is reported at 173 F. Supp. 98.

JURISDICTION

The judgment of the Court of Appeals was entered February 2, 1960. The petition for a writ of certiorari was filed March 1, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the validity of consecutive sentences on two counts of an indictment, alleged to state only one offense, may be raised by a motion under Rule 35, F.R. Crim. P., after affirmance of the conviction.[1]

2. Whether conspiracy to violate the Hobbs Act and a substantive offense thereunder are separate offenses for which consecutive sentences may be imposed.

STATUTE INVOLVED

18 U.S.C. 1951 provides in pertinent part as follows:

> (a) Whoever in any way or degree obstructs, delays or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

STATEMENT

The petitioner was convicted in the United States District Court for the Eastern District of Missouri on a two-count indictment charging in Count One conspiracy with others to obstruct interstate commerce by extortion and in Count Two obstructing interstate commerce by extortion, both in violation

[1] On this issue the government agrees with petitioner that the question may be raised by a motion under Rule 35 since the contention is based on the face of the indictment.

of 18 U.S.C. 1951. On July 19, 1954, he was sentenced to imprisonment for twelve years on each count, to run consecutively, but with sentence on the second count suspended and the petitioner placed on probation for five years on that count. The conviction was affirmed on appeal. 223 F. 2d 171, certiorari denied, 350 U.S. 862.

On December 17, 1958, the petitioner filed a motion for correction of sentence, arguing that both counts charged only one offense; that he could therefore be sentenced on the two counts to a maximum of only 20 years; and that, for this reason, his sentence on the first count should be reduced to eight years. The district court denied the motion, holding that the two counts charged separate offenses and that the sentence imposed was not illegal. It pointed out that, in any event, the petitioner would not have been entitled to the reduction of his prison term. It considered separately the question of whether the petitioner would be entitled to relief under 28 U.S.C. 2255 and ruled that there was no illegality in the sentence under Count One; and that any attempt to attack the suspended sentence under Count Two under 28 U.S.C. 2255 was premature since petitioner was not in custody under that sentence, 173 F. Supp. 98. The Court of Appeals affirmed, holding that the two counts charged separate offenses. It also stated that the proceeding could not be maintained because the issue was one which could have been, but was not, raised on appeal (Pet. App. 13-21).

ARGUMENT

1. This Court has held that, where it appears from the face of an indictment and judgment that a sentence is illegal, either because it is excessive or because it involves double punishment for the same offense, the error is one which may be corrected on collateral attack. This was established as far back as *Ex parte Lange*, 18 Wall. 163, and *In re Snow*, 120 U.S. 274. Since the enactment of Rule 35, F.R. Crim. P., it has been held that such a motion to correct lies under the rule when the claim of illegality is based on the face of the indictment. *Heflin* v. *United States*, 358 U.S. 415, 418, 422. Accordingly, although the petitioner could have raised the issue on direct appeal, we do not dispute his contention that he is now in a position to argue that the sentence is illegal under Rule 35 in that the claimed illegality appears from the face of the indictment and judgment.[2]

Both courts below, however, considered the validity of the petitioner's contentions as well as his standing. The ruling that the petitioner had no standing to raise the issue does not warrant further review in this case, since, as we discuss below, the courts below were correct in their conclusion that the petitioner's attack upon his sentence was without merit.

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[2] In this case the petitioner's motion would not lie under 28 U.S.C. 2255 since it is evident that, even if his legal argument had validity, it would not result in his release from imprisonment for twelve years, under count I. *Heflin* v. *United States*, 358 U.S. 415. The most that he could obtain would be the elimination of the consecutive, suspended sentence under count II.

2. The petitioner recognizes that there have been numerous decisions by this Court that conspiracy to commit a crime is separate from the crime itself. *Clune* v. *United States*, 159 U.S. 590; *Heike* v. *United States*, 227 U.S. 131; *United States* v. *Stevenson*, 215 U.S. 200, 203; *United States* v. *Rabinowich*, 238 U.S. 78, 85; *United States* v. *Bayer*, 331 U.S. 532, 541-543; *Sealfon* v. *United States*, 332 U.S. 575, 578. This principle has been applied specifically to the situation where separate punishments have been imposed on counts charging conspiracy and the substantive offense. *Carter* v. *McClaughry*, 183 U.S. 365, 395; *Pinkerton* v. *United States*, 328 U.S. 640, 643; see *Pereira* v. *United States*, 347 U.S. 1.

The petitioner argues that these rulings should nevertheless not be applied in his case because here the crime of conspiracy is defined, not in a separate statute, but in the same statute which prohibits the substantive offense. There is no warrant for this construction. The specific prohibition against conspiracy in this section was necessary to authorize the heavier punishment for that offense which this statute fixes, as against the five year punishment of the general conspiracy statute, 18 U.S.C. 371, and two years under former 18 U.S.C. (1946 ed.) 88. There is no reason to believe that Congress had any other purpose in mind. When Congress passed the predecessor statutes, the Anti-Racketeering Law of 1934 (48 Stat. 979) and the Hobbs Act of 1946 (60 Stat. 420), and indeed when this statute was included in the revision of Title 18 in 1948, the doctrine that

conspiracy and the substantive offense are separately punishable was unquestioned. There is thus no reason to believe that Congress intended a different rule to be applied to the offenses it created by these statutes than was applicable generally.

In so far as the legislative history tends to cast any light on the problem, it supports the view that Congress intended conspiracy to be a separate crime. As originally enacted the Act of June 18, 1934 provided that any person who in connection with an act affecting commerce:

> (a) Obtains or attempts to obtain, by the use of or attempt to use or threat to use force, violence, or coercion, the payment of money or other valuable considerations or the purchase or rental of property or protective services, not including, however, the payment of wages by a bona-fide employer to a bona-fide employee; or
>
> (b) Obtains the property of another, with his consent, induced by wrongful use or force or fear, or under color of official right; or
>
> (c) Commits or threatens to commit an act of physical violence or physical injury to a person or property in furtherance of a plan or purpose to violate sections (a) or (b); or
>
> (d) Conspires or acts concertedly with any other person or persons to commit any of the foregoing acts; shall, upon conviction thereof, be guilty of a felony and shall be punished by imprisonment from one to ten years or by a fine of $10,000, or both.

The Hobbs Act even more clearly separately defined the various offenses under the statute as follows:

> Sec. 2. Whoever in any way or degree obstructs, delays, or affects commerce, or the movement of any article or commodity in commerce, by robbery or extortion, shall be guilty of a felony.
>
> Sec. 3. Whoever conspires with another or with others, or acts in concert with another or with others to do anything in violation of section 2 shall be guilty of a felony.
>
> Sec. 4. Whoever attempts or participates in an attempt to do anything in violation of section 2 shall be guilty of a felony.
>
> Sec. 5. Whoever commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of section 2 shall be guilty of a felony.

The organization of the statute before codification makes it clear that Congress intended to make conspiracy to violate the substantive provisions a separate crime.

Particularly in relation to the crime here involved, there would be good reason for Congress to believe that concert of action was itself sufficiently serious to be subject to separate punishment. As this Court said in *United States* v. *Rabinowich*, 238 U.S. 78, 88, quoted with approval in *Pinkerton* v. *United States*, 328 U.S. at p. 644:

> For two or more to confederate and combine together to commit or cause to be committed a breach of the criminal laws is an offense of the gravest character, sometimes quite outweighing, in injury to the public, the mere commission of the contemplated crime. * * *

That would certainly be true of interference with interstate commerce by extortion.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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